

VIRGINIA FREEDOM OF INFORMATION ACT



TRAINING SEMINAR

THE RICHMOND CITY ATTORNEY'S OFFICE
GUIDE TO:
ACCESS TO PUBLIC RECORDS UNDER THE
VIRGINIA FREEDOM OF INFORMATION ACT
("VFOIA")



Code of Virginia Section 2.2-3700

B. By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.

Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and **all public records shall be available for inspection and copying upon request.** All public records and meetings shall be presumed open, unless an exemption is properly invoked.

Code of Virginia Section 2.2-3700 continued

The provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. **Any exemption from public access to records or meetings shall be narrowly construed** and no record shall be withheld or meeting closed to the public unless specifically made exempt pursuant to this chapter or other specific provision of law.

WHAT IS A PUBLIC BODY?

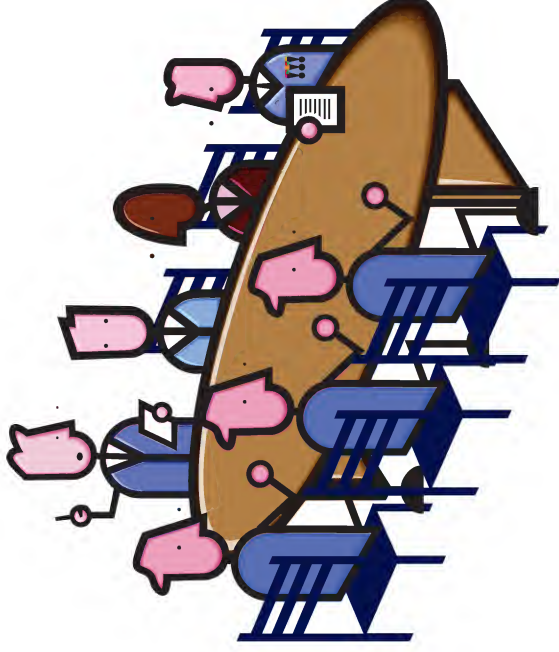
- For purposes of this training, “public body” includes:
 - Any board and commission of any city.
 - Any other organizations, corporations or agencies in the Commonwealth supported wholly or principally (i.e., two-thirds) by public funds.
 - Any committee, subcommittee, or other entity however designated, of a public body created to:
 - Perform delegated functions of the public body, or
 - Advise the public body,
- even if that committee, subcommittee, or other entity has private sector or citizen members.



I. PURPOSE

- a. The purpose of this guide is to provide **practical advice** to City board and commission members in adhering to VFOIA and the City's Administrative Regulations when responding to a request.
- b. This training will:
 - i. Assist City boards and commissions in meeting statutory freedom of information disclosure mandates;
 - ii. Increase the availability of City government information to the public;
 - iii. Increase the efficiency of City boards and commissions in responding to freedom of information requests; and
 - iv. Establish systems to record the costs to the City in responding to freedom of information requests and to charge requesters for those costs to the extent permitted under VFOIA.

II. ROLES OF PRESIDING OFFICER AND DESIGNATED VFOIA REPRESENTATIVE



a. Presiding Officer's Role

- i. This policy intends to promote an increased responsiveness to freedom of information requests. Consequently, each presiding officer shall read and familiarize him/herself with VFOIA. Further, each presiding officer shall designate a VFOIA representative as provided below. Each presiding officer shall recognize that freedom of information requests are time-sensitive and shall assist the board's or commission's VFOIA representative in providing a timely, appropriate response to every freedom of information requests.

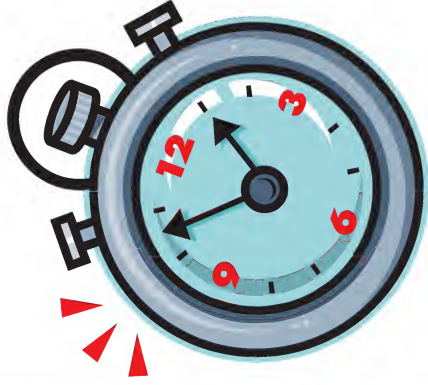
b. Designated VFOIA Representative

- i. Each presiding officer shall designate at least one member of his staff as that board's or commission's VFOIA representative. The presiding officer shall report the names of all VFOIA representatives or alternates to the Office of the Chief Administrative Officer upon designation. The Office of the Chief Administrative Officer shall maintain a list of VFOIA representatives and shall audit this list annually to ensure that it remains current. The VFOIA representative shall be primarily responsible for the board's or commission's response to freedom of information requests it receives from the public and the media. The VFOIA representative shall:

NOTE: FOIA (§ 2.2-3704.2) refers to this person as a “FOIA officer.” The City’s website refers to this person as a “FOIA officer” or a “FOIA contact.”

1. Read and familiarize him/herself with VFOIA;
2. Familiarize him/herself with Virginia statutes applicable to the board or commission that may expressly forbid the release of certain records, such as some criminal or tax records;
3. Develop and update procedures for responding to freedom of information requests;
4. Train board or commission members to recognize freedom of information requests and properly refer them to the board's or commission's VFOIA representative;
5. Receive all freedom of information requests directed to the board or commission;
6. Act as the point of contact within the board or commission for freedom of information requests referred to the board or commission by other boards, commissions, or agencies;

7. Maintain appropriate records concerning each freedom of information request in accordance with Section III (F) of Administrative Regulation 3.1;
8. Train alternate VFOIA representatives to handle time-sensitive freedom of information requests when the designated VFOIA representative is out of the office;
9. Respond in a timely fashion to freedom of information requests; and
10. Consult with the appropriate member of the Office of the City Attorney, as necessary, whenever a question arises regarding freedom of information requests or procedures.



III. BACKGROUND

- a. WHAT is a public record?
 - i. A “public record” is any writing or recording in any format, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.
 - ii. Examples include: handwritten notes, typewritten documents, electronic files, audio or video recordings, photographs, or any other written or recorded media. It also includes drafts or preliminary versions of any of the abovementioned examples.



b. WHO may request records?

- i. Citizens of the Commonwealth;
- ii. Representatives of newspapers and magazines with circulation in the Commonwealth; and
- iii. Representatives of radio and television stations broadcasting in or into the Commonwealth.

c. What triggers the necessity to comply with VFOIA and its provisions?

i. Must a request be made in writing?

I. No. A written request is not required. However, from a practical point of view, it is suggested that the request be made in writing (or use any request form provided by the public body). Documentation allows both parties to point to an exact request rather than fight later over what was requested. **VFOIA**
representatives are strongly encouraged to memorialize any oral request in a follow up correspondence to the requester.

ii. Must a request specifically mention “FOIA”?

I. No. The request need not make reference to FOIA in order to invoke its provisions or to impose the time limits for response by a public body.

iii. May an agency require a requester to fill out a request form?

I. No. While the administrative regulations mandate that agencies maintain a form on which either a walk-in requester or a City employee taking a request over the telephone may record the elements of the request, the board or commission may not require that this form be completed by the requester before it begins work on a VFOIA request.

iv. May a public body require a requester to provide his name and legal address?

I. Yes. A public body may require a requester to provide his name and legal address before processing a FOIA request.

NOTE: VFOIA does not mandate that a public body obtain identification before processing the request.

IV. RESPONDING TO A REQUEST

- a. *What should be done upon receipt of a VFOIA request?*
 - i. Referral – City board and commission members shall refer each request to their board's or commission's VFOIA representative on the same day they receive the request because such requests are time sensitive.
- b. *How long does a VFOIA representative have to respond to a request?*
 - i. A VFOIA representative must respond within five (5) working days of the board's or commission's receipt of the request in the manner specified by Va. Code Ann. §2.2-3704(B), or unless otherwise provided by the statute. Count the day after receipt as day 1.

NOTE: Failure to respond to a request for records is deemed a denial of the request and constitutes a violation of FOIA.

c. *What are the permissible responses to a VFOIA request?*

i. A VFOIA representative must select one of the five (5) responses allowed by VFOIA:

1. Provide the requested records to the requester;
2. The requested records are being withheld entirely because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with VFOIA;

NOTE: See the “Exemptions” section below.

3. The requested records are being **provided in part** because the release of part of the record is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with VFOIA;

NOTE: Generally, if a record contains exempt and non-exempt information, the public body must release the record, and delete or excise the portion of the record subject to the exemption. See the “Exemptions” section below for more information.

4. The requested records **could not be found or do not exist**. However, if the board or commission that received the request knows that another board, commission, agency, or VFOIA representative has the requested records, the response shall include contact information for the other board, commission, agency, or VFOIA representative; or

NOTE: The agency is not required to create a new record if the requested record does not already exist. However, the agency may abstract or summarize information under such terms and conditions as agreed between the requester and the public body. See the “Records Retention” section below for more information.

5. It is **not practically possible to provide** the requested records OR to determine whether they are available **within the five-work-day period**, and the VFOIA representative needs an additional seven (7) workdays in which to provide one of the four preceding responses.

d. *When does a response need to be in writing?*

i. If any part of the VFOIA response to a request is “NO” (see e.g. responses #2 and #3 above), the response must:

1. Be in writing; and
2. Identify with reasonable particularity the volume and subject-matter of withheld records; and
3. Cite, as to each category of withheld records, the specific section of the Code of Virginia that authorizes the records to be withheld.



- ii. If the answer is “we cannot find it” or “it does not exist” (see e.g. response #4 above), then the response must:



1. Be in writing; and
2. If the VFOIA representative knows that another agency/VFOIA representative has the records or may have the records, it must provide contact information for the other agency/VFOIA representative in his response.

- iii. If the answer is “we need more time” and the VFOIA representative would like seven (7) additional working days to respond (e.g. response #5 above), then the response must:

1. Be in writing; and
2. **Specify the conditions** that make production of the records impossible.

- e. *What happens after the board or commission has gathered all necessary documents that respond to the request?*
 - i. Once the board or commission has amassed all of the records that respond to the request, the VFOIA representative shall review the records to:
 - 1. Make a record of what the board or commission is providing to the requester; and
 - 2. Identify any records the VFOIA representative believes are excluded from the law's disclosure requirements.
- f. *What happens if the VFOIA representative believes some records are exempt from disclosure?*
 - i. The VFOIA representative shall consult the Office of the City Attorney, adhering to the following guidelines:

1. The VFOIA representative shall not send a request to the Office of the City Attorney before gathering the records that respond to the request.
2. Upon identifying records that may be exempt from disclosure, the VFOIA representative shall immediately contact **the lawyer in the Office of the City Attorney that represents the board or commission.**
3. The VFOIA representative shall promptly provide the lawyer with a copy of:
 - a. The request; and
 - b. The record(s) that the VFOIA representative believes may be exempt from the law's disclosure requirements.

NOTE: The VFOIA representative shall send the lawyer only those records that he actually has reason to believe may be excluded from the law's disclosure requirements.

- c. The VFOIA representative shall allow at least two (2) working days before a response is due to the requester for a lawyer to review the request and the records that may be excluded from the law's disclosure requirements.



V. CHARGING FOR REQUESTS

- a. *How much may a board or commission charge for producing records in response to a VFOIA request? Is a board or commission required to charge the requester for the City's response?*
 - i. In general, a board or commission may make reasonable charges for its actual cost incurred in accessing, duplicating (making copies), supplying or searching for the requested records. A board or commission may not charge for extraneous or surplus fees unrelated to the production of the records.

NOTE: This means that a board or commission cannot factor in expenses such as overhead or the cost of benefits paid to employees.

- ii. City Administrative Regulation 3.1 requires City employees responding to a VFOIA request to charge the requester to recoup the City's costs. See A.R. 3.1, III, E.

b. *Can the board or commission be required to estimate the costs of supplying the requested records in advance? If so, what is to be included in that estimate?*

i. Yes. A citizen may request that the board or commission estimate the cost of responding to his request in advance. Further, City Administrative Regulation 3.1 requires City employees responding to a VFOIA request to provide an estimate pursuant to the following guidelines:

I. Records Available on Internet or at Library – Upon receiving a request, the VFOIA representative shall determine if the information is already available to the public on the Internet or at a public library. If so, the VFOIA representative shall contact the requester by the fastest means possible and inform him that the information is available free of charge on the Internet or at the public library.

a. **NOTE:** Should the requester decide to seek the records on the Internet or at the public library, the VFOIA representative shall send a letter to the requester confirming the requester's decision.

2. Records NOT Available on Internet or at Library –

If the requested records are not publicly available on the Internet or at a public library, the VFOIA representative shall estimate the cost of complying with the request, including the following factors:

- a. The actual cost of time spent by City employees in searching for, gathering records in response to a request. The VFOIA representative shall use the lowest-paid employee capable of performing these tasks. For each employee, this cost shall be calculated as the hourly rate of the employee (not including benefits or other overhead costs for that employee) multiplied by the number of hours that employee spends performing tasks in response to that VFOIA request.

- b. The actual cost of duplication.
- c. The actual cost of mailing or delivering.

NOTE: This cost shall be the amount expended by the City in mailing or otherwise delivering the records to the requester but shall not apply where the requester comes and picks up the records.



NOTE: FOIA clearly provides the requester the option of either inspecting the records at the board's or commission's place of business or obtaining copies of the records.

- c. *How is the estimate to be communicated to the requester?*
- i. The VFOIA representative shall communicate the estimate to the requester by the fastest means possible according to the following:
1. The Estimate Cost Is Less Than or Equal to \$200
 - If the estimated cost of fulfilling the request is less than or equal to \$200, the VFOIA representative shall inform the requester that payment is due upon delivery of the response to the request.
 2. The Estimated Cost Is Greater Than \$200 – If the estimated cost of fulfilling the request is greater than \$200, the VFOIA representative shall inform the requester in writing that, as authorized by § 2.2-3704(F) of the Code of Virginia:



- a. The board or commission will not continue to process the request until it has received a deposit in the amount of the estimate from the requester;
- b. The board or commission will credit the deposit toward the final cost of supplying the requested records; and
- c. The statutory period within which the board or commission must respond, five (5) working days, to a request will be tolled until the deposit is paid.



d. *How are the costs of complying with a request to be billed to the requester?*

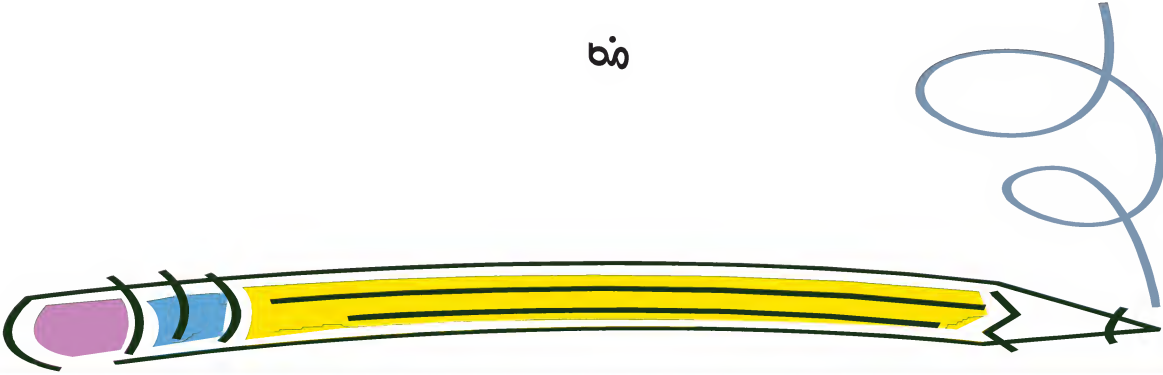
- i. Upon the completion of the work and duplicating necessary fulfill a request, the VFOIA representative shall prepare an invoice of the costs. The invoice shall include all of the applicable factors listed in A.R. 3.1 IV(b)(i)(2) and shall be in a form approved by the Chief Administrative Officer or his designee. The VFOIA representative shall see that the invoice is presented to the requester along with the records responding to his request.

e. *How are the charges for processing the VFOIA request to be collected from the requester?*

- i. If the requester has made a deposit, such deposit shall be credited against the invoiced cost. If the deposit is insufficient to cover the invoiced cost, the VFOIA representative shall invoice the request for the additional costs. If any portion of the deposit remains after credited against the invoiced cost, the VFOIA representative shall return such portion to the requester with the response request.

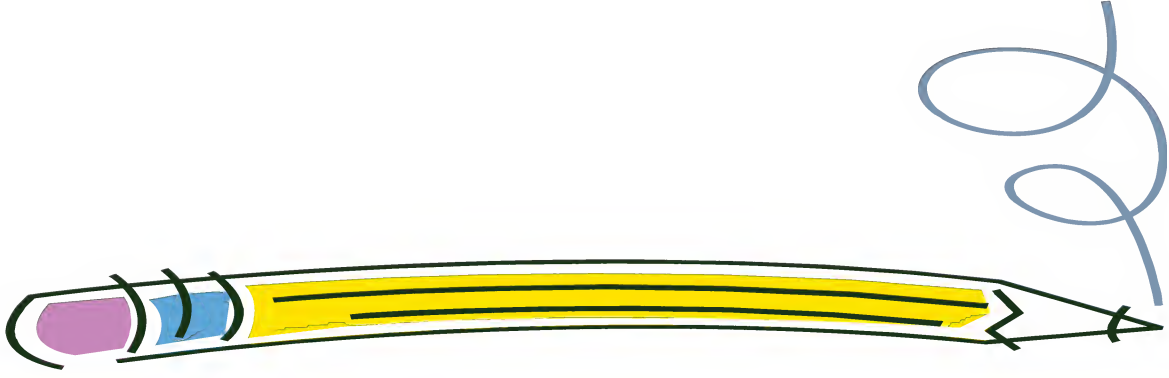


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- ii. If the requester appears in person either to inspect the requested records or to pick up copies thereof, the VFOIA representative should try to collect the charge for the request before providing the requester with access to or copies of the records.
 - iii. If the requester requests delivery by mail or electronic mail, the invoice provided with the board's or commission's response to the request shall state that the requester has ten (10) calendar days to pay the City the invoiced amount and that the City reserves the right to impose an interest charge of nine percent (9%) per annum and to pursue its standard collection procedures for delinquent accounts after thirty (30) calendar days.
 - iv. Pursuant to § 2.2-3704(I) of the Code of Virginia, before processing a request for records, the City may require the requestor to pay any amounts owed for previous requests for records that remain unpaid thirty (30) days or more after billing.

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- f. *What can the board or commission do if the requester does not pay for records provided under VFOIA?*
- i. Before responding to a new request for records, the board or commission may require the requester to pay any amounts owed to the board or commission for previous requests for records that remain unpaid for thirty (30) days or more after billing.
- g. *Do the same requirements apply to a request for electronic records?*
- i. Yes. However, like all other records, the board or commission may only charge a reasonable, not to exceed actual, cost for producing public records maintained in an electric data processing system or computer database. Also, like all other records, when electronic records or databases contain both exempt and nonexempt records, the public body must supply the nonexempt information and excise or delete the exempt information.

NOTE: The excision of exempt information is not considered the creation of a new document under VFOIA

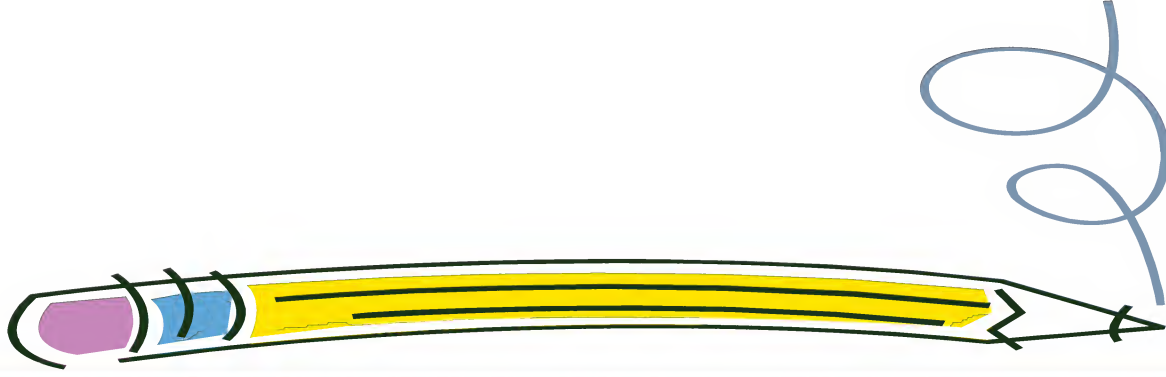




ii. A board or commission must provide electronic records in any medium identified by the requester if that medium is used by the board or commission in the regular course of business. If the board or commission has the capability, this includes the option of posting the records on a website or delivering the records to an email address. While a board or commission must make reasonable efforts to provide records in any format under such terms and conditions as agreed between the requester and the board or commission, the board or commission is not required to produce records in a format not regularly used by the board or commission.

h. Special Circumstances & Exceptions

- i. Intergovernmental Waiver of Costs – The costs associated with responding to VFOIA requests from governmental entities shall be waived whenever such an entity extends the City reciprocity regarding cost waiver. Costs associated with VFOIA requests from all other governmental entities may be waived at the discretion of the presiding officer. In all cases where costs are waived, an invoice shall be prepared for the purpose of record keeping.*
- ii. Charging Under Special Circumstances – When a requester requests the reproduction of topographical maps or the production of records from the City’s Geographic Information System, the VFOIA representative, in responding to the request, shall follow the special guidelines set forth in § 2.2-3704(F) of the Code of Virginia in charging for these types of requests.*



VI. GENERAL RECORDS EXEMPTIONS

a. Personnel Records, § 2.2-3705.1 (1):

- i. Provides an exemption for personnel records containing information concerning identifiable individuals, except that access shall not be denied to the person who is the subject thereof (for definition of “personnel records,” see *Virginian-Pilot Media Cos. L.L.C. v. City of Norfolk*, 2010).

BUT NOTE: Public nonetheless has access to:

- contracts between a public body and its officers or employees, other than contracts settling public employee employment disputes;
- records of the name, position, job classification, official salary, or rate of pay of, and records of the allowances or reimbursements for expenses paid to, any officer, official, or employee of a public body (but, per VFOIA Council, **NOT** employee timesheets, and therefore **NOT** records of overtime pay)
- compensation or benefits paid by any corporation organized by the Virginia Retirement System, its officers or employees.

b. Attorney-client Privilege, § 2.2-3705.1 (2):

- i. Provides an exemption for written advice of legal counsel to state, regional or local public bodies or the officers or employees of such public bodies, and any other records protected by the attorney-client privilege.

c. Attorney Work Product, § 2.2-3705.1 (3):

- i. Provides an exemption for legal memoranda and other work product compiled specifically for use in litigation or for use in an active administrative investigation concerning matter that is properly the subject of a closed meeting under § 2.2-3711.

d. Closed Meetings, § 2.2-3705.1 (5):

- i. Provides an exemption for records **recorded in or compiled exclusively for use in closed meetings** lawfully held pursuant to § 2.2-3711.

- e. Vendor Proprietary Information Software, § 2.2-3705.1 (6):
 - i. Provides an exemption for vendor proprietary information software that may be in the official records of a public body. For purposes of this subdivision, “vendor proprietary information software” means computer programs acquired from a vendor for purposes of processing data for agencies or political subdivisions of the Commonwealth.
- f. Cost Estimates of Real Property, § 2.2-3705.1 (8):
 - i. Provides an exemption for appraisals and cost estimates of real property subject to a proposed purchase, sale or lease prior to the completion of such purchase, sale or lease.
- g. Personal Contact Information, § 2.2-3705.1 (10):
 - i. Exemption for personal information, including (i) address, (ii) email address, or (iii) telephone number; furnished to public body for purpose of receiving electronic mail from public body, **provided electronic mail recipient has requested public body not disclose such information.**

h. Contracts, § 2.2-3705.1 (12):

- i. Provides an exemption for records relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such records would **adversely affect the bargaining position or negotiating strategy of the public body.** Such records shall not be withheld after the public body has made a decision to award or not to award the contract.

BUT NOTE: In the case of procurement transactions conducted pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), any release of information relating to such transactions shall be governed by the Virginia Public Procurement Act.

i. Personal Financial Information § 2.2-3705.1 (13):

- i. Provides an exemption for account numbers or routing information for any credit card, debit card, or other account with a financial institution of any person or public body, provided that access shall not be denied to the person who is the subject of the information.

NOTE: Public bodies also forbidden from disclosing State income, business, and estate tax returns, personal property tax returns, and confidential records held pursuant to § 58.1-3.

j. Human Resources Investigation, § 2.2-3705.3(3):

- i. Provides and exemption for investigator notes, and other correspondence and information, **furnished in confidence** with respect to an active investigation of individual employment discrimination complaints made to the Department of Human Resource Management or to such personnel of any local public body as are responsible for conducting such investigations in confidence. However, the law does not prevent the disclosure of information taken from inactive reports in a form that does not reveal the identity of charging parties, persons supplying the information or other individuals involved in the investigation.

NOTE: (i) Information, i.e. evidence, furnished in confidence never loses its excludable status; (ii) Final reports are “inactive reports” and must be disclosed (but can redact as permitted); (iii) **None** of the above can be withheld from the individual who is the **subject** of such an investigation due to the Government Data Collection and Dissemination Practices Act (*McChrystal v. Fairfax County Bd. of Supervisors*, 2005)

k. Auditor's Reports in Draft Form, § 2.2-3705.3(7):

- i. Provides an exemption for investigative notes, correspondence and information **furnished in confidence** provided to or produced by or for the City Auditor. However, records of completed investigations shall be disclosed in a form that does not reveal the identity of the complainants or persons supplying information to investigators. Unless disclosure is excluded by § 2.2-3705.3(7), the records disclosed shall include, but not be limited to, the agency involved, the identity of the person who is the subject of the complaint, the nature of the complaint, and the actions taken to resolve the complaint. If an investigation does not lead to corrective action, the identity of the person who is the subject of the complaint may be released **only** with the consent of the subject person. Local governing bodies shall adopt guidelines to govern the disclosure required by this subdivision.

I. Zoning Complaints § 2.2-3705.3 (8):

- i. The names, addresses, and telephone numbers of complainants **furnished in confidence** with respect to an investigation of individual zoning enforcement complaints or complaints relating to the Uniform Statewide Building Code (§ 36-97 et seq.) or the Statewide Fire Prevention Code (§ 27-94 et seq.) made to a local governing body.

m. Promoting Business § 2.2-3705.6 (3):

- i. Proprietary information, voluntarily provided by private business pursuant to public body promise of confidentiality, used by public body for business, trade, and tourism development or retention; and memoranda, working papers, or other information related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where disclosure would adversely affect public body financial interest.